FILED February 28, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SA CV 11-1076 ODW (MRW)

MARVIN VERNIS SMITH,
Petitioner,
v.
RAUL LOPEZ, Warden,
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Otis D. Wright II, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

A jury convicted Petitioner for the brutal murder of his wife. For most of the trial, the prosecution contended that Petitioner acted alone in committing the murder. However, after the close of the evidence, the prosecutor requested that the trial court instruct the jury that it could convict Petitioner for aiding and abetting another, unidentified person who was the actual killer.

The state appellate court initially reversed Petitioner's conviction. That court concluded that the lack of evidence of an accomplice and the prosecution's last-minute change of theory unfairly prejudiced the defense. The state supreme court vacated the decision, however. The appellate court later affirmed the conviction.

On habeas review, this Court concludes that the late introduction of the aiding-and-abetting theory at trial violated Petitioner's right to due process. The state appellate court ruled that the defense had adequate notice of the prosecution's aiding-and-abetting theory based on one witness's statement presented at a preliminary hearing. However, on the first day of trial, the judge learned that this witness refused to testify. The trial judge then expressly ordered the parties not to refer to the witness. The judge's order essentially prohibited the prosecution from pursuing its aiding-and-abetting liability at trial. In its second decision addressing Petitioner's due process / lack of notice claim, though, the state appellate court ignored the existence of the trial judge's order and the circumstances that led to the exclusion of this evidence. That was a major omission, and constitutes an unreasonable determination of the facts in this case.

The evidence at trial of Petitioner's guilt was not overwhelming. As a result, the Court concludes that the state court's constitutional error here was not harmless. The Court therefore recommends that a writ of habeas corpus be issued, and that the state either retry Petitioner for the homicide or dismiss the action.

II. FACTS AND PROCEDURAL HISTORY

A. The Murder Trial

The victim, Minnie Smith, was found partially clothed in the bedroom of her home. She was killed by a crushing blow to the head from a fireplace tool. Medical evidence showed additional minor injuries, although it was not clear whether the wounds were inflicted before or after her death. When the police arrived at the scene, the house was in a state of disarray – as if it had been burglarized. Several weeks after the killing, Petitioner was arrested and charged with murdering his wife.

1. The Prosecution Case

At trial, the prosecution accused Petitioner of committing the murder by himself, and of staging the burglary and injuries to his wife's body to mislead investigators. The prosecution presented evidence that Petitioner was unfaithful to his wife for many years. From this, the prosecution argued that Petitioner had a motive to kill his wife – instead of divorcing her and thereby sharing the couple's substantial assets.

As proof of Petitioner's direct involvement in his wife's killing, the prosecution pointed to: the recovery of Petitioner's DNA from the victim's body; the police found jewelry that Petitioner claimed was stolen from the residence in the trunk of his car; and scientific evidence linking packing tape near the victim's body with tape found on the box with the jewelry in Petitioner's car. Additionally, the prosecution presented expert testimony from a criminologist who opined that the condition of the residence appeared to have been staged and was not the result of a real burglary. The prosecution emphasized implausible aspects of the crime scene (weapons and valuables not stolen from the residence; the bizarre injuries inflicted on the victim) and Petitioner's incongruous actions, statements, and lack of emotion following the discovery of the murder as additional proof of his culpability.

2. The Defense Case

Petitioner vigorously defended the case. The defense retained and presented expert evidence from: a forensic pathologist (challenging the time-of-death assumptions of the government's expert); a criminologist (opining that the home did appear to have been burglarized); and a pottery specialist (explaining why an expensive vase could have survived a fall onto a tile floor from a burglar's entry or exit though a nearby window).

Additionally, the defense presented medical evidence that Petitioner – a 70-year-old man who had recently had a major shoulder operation – was physically incapable of inflicting the killing blow to his wife. The defense presented detailed documentary and testimonial evidence of Petitioner's movements throughout Southern California on the day of the killing to establish an alibi. Petitioner's first wife also testified to refute the significance of the jewelry found in the car.

3. The Missing Jailhouse Informant

At the preliminary hearing, the prosecution offered additional evidence linking Petitioner to the crime – a confession that Petitioner allegedly made to a jailhouse informant. The lead police investigator testified that the informant (Moraga) said that Petitioner admitted participating in the crime because his wife wanted to divorce him due to his infidelity. The informant stated that Petitioner admitted that he staged the burglary. The informant also said that Petitioner left the house unlocked with the home alarm off, which implied that another individual later entered the house and killed the victim. (This formed the basis of the aidingand-abetting theory as identified by the appellate court (discussed below).) According to the informant, Petitioner gave no details about the actual killing and did not identify any other individual involved in the homicide.

Midway through the prosecution's opening statement at trial, the defense learned that the informant refused to testify at trial. The trial court excused the jury and conducted a special hearing at the defense's request. The informant's defense lawyer and a supervising public defender testified at the hearing about the circumstances of the informant's unwillingness to testify.[FN1]

FN1 The informant's defense attorneys claimed that the prosecutor threatened to

> enhance the informant's criminal sentence if he did not testify consistent with his earlier statement to investigators regarding Petitioner's admissions. The circumstances of the alleged threat are irrelevant to the pending habeas matter. What is relevant is that, after interacting with the prosecution, the informant invoked his Fifth Amendment privilege and refused to testify at all. (Lodgment # 2, 2 RT at 379-80.)

At the conclusion of the lawyers' testimony, the court agreed to recess the trial for nearly two weeks. The defense lawyer complained that a substantial part of her planned opening statement would have addressed the anticipated testimony of the informant who, as discovered on the eve of trial, might not testify at all. The court agreed that a continuance was appropriate to allow the defense to revise the opening statement and its overall strategic approach to the trial.

In ruling on the defense request for a continuance, the court expressly acknowledged the significance of the informant's potential testimony and the impact of his refusal to testify for the prosecution:

> I am going to instruct both sides not to discuss the prospect of Mr. Moraga's testimony in their opening statements at this point. Based on what I do hear from [the informant's attorney], I am of the view that there is not sufficient basis for either side to entertain a good faith belief that he is going to be called. So I'm going to preclude [the] prosecution from commenting about the prospect of Mr. Moraga's testimony or what he is going to say if he testifies in their opening statement.
>
> With respect to the defense request to continue their opening statement [from

> November 1] until Tuesday, November 13th, that request is granted. I do agree with the defense that because of this information that's come to light today, opening statement is strategically a significantly important part of both sides' case.
>
> I realize that [the] issue of Mr. Moraga is a big basket that you may have put many of your eggs in. The prospect – I think it's fair to say, the doubtfulness of Mr. Moraga's testimony in this case I think, in fairness to the defense, the defense should be given an opportunity to reengineer its opening statement in such a way that the issue of Mr. Moraga isn't talked about[.]

(Lodgment # 2, 2RT at 424) (emphasis added).

The trial judge was correct to doubt whether the prosecution would eventually call the informant as a witness. Despite being held in a cell in the courthouse during the duration of the trial, the informant did not testify in the prosecution's case. Toward the end of the evidentiary presentation, the prosecutor again addressed the issue. The prosecutor specifically told the trial court that "I am not going to use him [Moraga] in my case in chief. In the event that the defendant testifies, I may reassess that." (Lodgment # 2, 10 RT at 2059.) Neither Petitioner nor the informant testified at the murder trial.

Notably, the prosecution presented no evidence at trial to establish that anyone other than Petitioner killed the victim or was involved in the crime. To the contrary, from the outset of the trial, the prosecution presented evidence consistent with its theory that Petitioner personally killed the victim. The prosecutor dramatically opened the case by stating, "that man over there at the end of counsel table, wearing a nice sweater, murdered his wife of 27 or 28 years, and then he staged the crime scene to make it look like a burglary and to avoid detection. That's

what the evidence will show." (Lodgment # 2, 2RT at 288.)

Both sides presented considerable amounts of evidence during the closely contested trial. The prosecution called over 40 witnesses and offered over 220 exhibits into evidence. The defense called nearly 30 witnesses, submitted almost 100 exhibits, and forcefully cross-examined many of the government's witnesses. The trial lasted over one month. The transcript of the proceedings (including pretrial proceedings) fills 16 volumes.

4. The Aiding-and-Abetting Jury Instruction

After the close of evidence, the trial court met with the parties to discuss jury instructions. The prosecution submitted a set of proposed instructions that included a request for an instruction on the elements of aiding-and-abetting liability. (Lodgment # 2, 15 RT at 2878.) The prosecutor noted that the defense theory of the case was that Petitioner "did not or could not have committed the crime himself [due to his shoulder injury.] But that doesn't mean that, if he didn't commit the crime himself, that if they find that he aided and abetted in the crime, that he's still not guilty of the crime." (Id. at 2882.) The prosecutor expressed concern that, "if he didn't swing the murder weapon, it doesn't mean that he's not guilty of the crime[.] And I think the jury needs to be instructed on that." (Id. at 2882-83.)

The defense vehemently objected to the proposed instruction during the conference and in a written filing submitted the next day. Among the reasons that the defense attorney asserted in opposition to the instruction was that, "I have, up until I received this instruction, never heard that the prosecutor was relying on a theory of [aiding and abetting] culpability[.] Throughout this case, there's been absolutely no sign that this was the People's theory." (Id. at 2884.) The defense also argued that

there was no evidence that Petitioner actually aided or abetted another individual in committing the murder to support such an instruction.

The trial judge did not take up the question as to whether the prosecution previously asserted an aiding-and-abetting theory during the trial. Rather, the judge believed that he had a sua sponte obligation to give the instruction based on the prosecution's request. (Id. at 2884.) The court concluded (erroneously, as the California Court of Appeal later ruled) that there was evidence showing that Petitioner might have been involved in or benefitted from the offense even if he was not physically capable of committing the crime. (Id. at 2886.)

Additionally, midway through the defense closing, the judge confirmed with the prosecutor, "Is aiding and abetting a theory that you are relying on in this case?" The prosecutor responded, "Yes, Your Honor." (Lodgment # 2, 16 RT at 3034.) The court then reiterated that "the jury needs to be instructed on [ ] aiding and abetting." (Id. at 3037.) At no point in the jury instruction colloquy did the trial judge refer to his ruling during opening statements in which he prohibited the parties from mentioning the non-testifying informant.

5. Closing Arguments

The prosecution did not address the aiding-and-abetting theory in its first presentation during closing argument. The defense attorney preemptively touched on the issue by suggesting that, on rebuttal argument, the prosecution would argue "a new theory in this case, for the first time ever, here today. I predict you're going to hear the prosecution say [in its rebuttal argument] there had to be a second person involved." (Lodgment # 2, 16 RT at 3055.) The defense stated that, "Now that we've proven that [Petitioner] couldn't have done it[,] there's going to be a second phantom guy who killed the victim for

Petitioner." The defense then argued that Petitioner did not aid or abet another individual in the homicide.

In rebuttal, the prosecution took up the aiding-and-abetting issue ambivalently. The prosecutor affirmatively stated that the theory of the case was that "the defendant murdered his wife. Left-handed, two-handed, right-handed, using a side blow, it doesn't matter to me." (Id. at 3111.) However, the prosecutor acknowledged that several jury members could conclude that Petitioner was physically unable to kill his wife, but they "know he's in on it." The prosecutor argued that Petitioner could be found guilty of the crime for aiding and abetting the unidentified, actual killer. The prosecutor invited the jury to explore both direct and indirect liability for Petitioner, stating that "half of you can think it was one way and the other half think it's the other way, doesn't matter. That's still a guilty verdict." (Id. at 3113.) The prosecutor noted, "I could care less which one you believe." (Id. at 3112.)

After the conclusion of the lawyers' arguments and before the court instructed the jury, the defense lawyer again asked the court not to give the aidingand- abetting instruction. The lawyer noted that the prosecutor brought up the aiding-and-abetting concept hesitantly in the rebuttal closing argument, and in an ambivalent and confusing manner. The prosecutor suggested that it discussed the theory because "it was the court's position that the aiding and abetting instruction has to be given." The defense lawyer explained, however, that the prosecutor told the court that this "was one of the People's theories, and then he's told the jury that it isn't." (Id. at 3118.) Based on the prosecutor's inconsistent positions, the defense urged the court to forego instructing the jury on this theory.

The court rejected the defense argument and gave the aiding-and-abetting instruction. However, the court incorrectly included aspects of the CALJIC

form aiding-and-abetting instruction that were irrelevant to the facts of the case (whether Petitioner withdrew from the criminal plot, and basing liability on the "natural and probable consequences" of his actions). (Id. at 3134-35.)

The jury convicted Petitioner of first degree murder. The jury was not given a special verdict form. As a result, there was no finding as to whether the jury convicted Petitioner on the theory that he directly committed the killing or aided and abetted the perpetrator.

B. The First Appellate Decision – Conviction Reversed

On direct appeal, the California Court of Appeal reversed Petitioner's conviction. (Lodgment # 6) (the "First Appellate Decision"). The appellate court concluded that there was no evidence that any person other than Petitioner participated in the murder. The court explicitly found that there was "no evidence that [Petitioner] discussed killing her with anyone or that he attempted to hire another to commit the murder." (Id. at 8-9.) The court further agreed with Petitioner that "the prosecutor proceeded solely on the theory [at trial that] defendant killed his wife." The First Appellate Decision concluded that the aiding-and-abetting instruction was unwarranted, and held that the trial court erred as a matter of state law by instructing the jury as to a theory of guilt "not supported by the evidence." (Id. at 10.)

The court further found this error to be prejudicial. The appellate court noted the sequence of the closing arguments, the notes that the jury sent out during deliberations, the evidence submitted in defense of the charge, and the substantive mistakes in the aiding-and-abetting instruction as relevant to its analysis of prejudice. The First Appellate Decision found prejudicial error because it would be "difficult to apply the general presumption" that the jury

understood and followed the instructions as a whole in this case. (Id. at 10-11.)

C. The Second Appellate Decision – Conviction Affirmed

The state sought review in the California Supreme Court. The supreme court vacated the appellate decision and remanded for reconsideration in light of People v. Guiton, 4 Cal. 4th 1116 (1993). On reconsideration, the Court of Appeal affirmed Petitioner's conviction. (Lodgment # 10) (the "Second Appellate Decision").

Guiton stands for the proposition that a criminal conviction must generally be reversed under state law when the jury is instructed on a "legally inadequate theory." People v. Green, 27 Cal. 3d 1 (1980). Reversal "is not required," though, simply because a jury is instructed on a "factually inadequate theory." Griffin v. United States, 502 U.S. 46 (1991). When there are "two possible grounds for the jury's verdict, one unreasonable and the other reasonable" – that is, supported by sufficient evidence – "we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." Guiton, 4 Cal. 4th at 1127.

On remand from the supreme court, the appellate court concluded that it could not determine whether Petitioner's jury convicted him "solely on the aiding and abetting theory" in violation of Guiton. (Lodgment # 10 at 8.) The court apparently maintained its conclusion from the First Appellate Decision that the aiding-and-abetting theory was not supported by the evidence. However, applying Guiton and Griffin, the court's Second Appellate Decision found no error because the jury was presented with a factually supported theory (Petitioner as direct assailant) and could have based its verdict on this ground. (Id. at 8-10.)

The Second Appellate Decision also found no due process violation from the prosecution's late reliance on the aiding-and-abetting theory. The court determined that the criminal information adequately notified Petitioner of the murder charge and the possibility of aiding-and-abetting liability. Moreover, "even if this case required greater specificity concerning the basis of defendant's liability, the evidence presented at his preliminary examination provided it." (Id. at 11 (emphasis added).) The Second Appellate Decision pointed to the investigator's summation of the informant's jailhouse discussion with Petitioner as presented at the preliminary hearing. The Court of Appeal determined that this testimony "meaningfully apprised [Petitioner] of the potential for an aiding and abetting theory" at trial. (Id. at 13.)

The court noted that the informant did not testify at trial. However, the Second Appellate Decision made no mention of the unique circumstances – the informant's refusal to testify, the interruption of the prosecution's opening statement, the extraordinary evidentiary hearing, the testimony of the informant's lawyers, and the delay in resuming the trial – by which the prosecution was unable to present evidence from the jailhouse informant. Additionally, the Second Appellate Decision did not refer to the trial court's express order to the parties at the beginning of the trial to avoid mentioning the informant's allegations. Nevertheless, the court held that the prosecution did not "ambush" defendant by requesting the aiding-and-abetting instruction at the close of trial and "did not deny defendant the notice guaranteed him under the Constitution." (Id. at 13-14 (quotations omitted).)

The state supreme court denied review. This federal habeas action followed.

III. DISCUSSION

A. Standard of Federal Court Review Under AEDPA

Petitioner's claims are subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In a habeas action, this Court reviews the state courts' last reasoned decision. Maxwell v. Roe, 628 F.3d 486, 495 (9th Cir. 2010). Here, the California Court of Appeal's Second Appellate Decision affirming Petitioner's conviction (Lodgment # 10) stands as the last reasoned decision on Petitioner's claims. Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, ___ U.S. ___, 130 S. Ct. 841, 849 (2010). The "unreasonable determination of the facts" standard may be met where "the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." Ocampo v. Vail, 649

F.3d 1098, 1106 (9th Cir. 2011); Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir. 2004) (state court's "failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding").

Overall, Section 2254(d) presents "a difficult to meet [ ] and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1398 (2011) (quotations omitted). On habeas review, AEDPA places on Petitioner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 786-87 (2011). Put another way, a state court determination that a claim lacks merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Richter, 131 S. Ct. at 786 (quotations omitted).

B. Due Process Claim

1. Legal Standard [FN2]

[FN2] The Court notes that Respondent's brief in answer to the habeas petition (Docket # 9) was singularly unhelpful in setting forth the applicable law. The state's brief did not cite any relevant judicial opinions regarding the due process claim in the petition, and did not directly address Petitioner's argument. Indeed, Respondent's brief does not contain the word "notice" at all, which is fundamental to Petitioner's contention on habeas.

The district court is entitled to exercise its discretion to refuse to consider such an argument from the state if presented in this

> Court only in response to the Report and Recommendation. See, e.g., United States v. Howell, 231 F.3d 615, 621-23 (9th Cir. 2000) ("[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation.").

The Sixth Amendment guarantees that a defendant be "informed of the nature and cause" of criminal charges to be presented at trial. U.S. Const., Amend. VI. It is clearly established federal law under the Constitution that a criminal defendant have "reasonable notice of a charge against him, and an opportunity to be heard in his defense." In re Oliver, 333 U.S. 257, 273 (1948); Cole v. Arkansas, 333 U.S. 196, 201(1948); Gautt v. Lewis, 489 F.3d 993, 1002 (9th Cir. 2007) (criminal defendant has fundamental right to notice of charges "to permit adequate preparation of a defense").

The starting point to determine whether a defendant had adequate notice of the criminal allegation is the charging document. Due process requires that the formal charge set forth the elements of the offense "with sufficient clarity to apprise a defendant of what he must be prepared to defend against." Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986) (information inadequate to inform defendant of special elements of murder charge).

In addition to the charging document, a defendant may be adequately informed of the nature of the charges by "a complaint, an arrest warrant, [ ] a bill of particulars[, or] during the course of a preliminary hearing." Sheppard v. Rees, 909 F.2d 1234, 1236 n.2 (9th Cir. 1989). Moreover, a defendant may receive "constitutionally adequate notice" of a theory regarding the commission of the charged crime "from the testimony" of witnesses during the trial. Morrison v. Estelle, 981 F.2d 425, 428 (9th Cir. 1992); Murtishaw v. Woodford, 255 F.3d. 926, 954

(9th Cir. 2001) (defendant's "actions at trial" in responding to prosecution evidence "suggest that he actually had notice of the felony murder theory"). Where the prosecution requests a jury instruction at the conclusion of a trial that conforms to evidence introduced during the case, due process is satisfied when the defense has sufficient time and notice to prepare for closing argument regarding the new theory of the case.[FN3] Stephens v. Borg, 59 F.3d 932, 935 (9th Cir. 1995).

> [FN3] Petitioner's reference to Lucas v. O'Dea, 179 F.3d 412 (6th Cir. 1999), addresses a different constitutional analysis not raised in the state court proceedings. The Lucas Court found that the prosecution's evidentiary presentation and requested jury instructions constituted a "variance from the indictment" and a "constructive amendment" of the charge against the defendant. Lucas, 179 F.3d at 417. However, in the present case, Petitioner neither cited to Lucas nor advanced a variance-from-charging-document argument in the state courts. (Lodgment # 3, 11 (appellant's briefs to state court of appeal and supreme court).) Accordingly, the Court will not take up this unexhausted argument on habeas review.

Under basic due process principles, "[t]he question is whether the accused was taken by surprise" by a change in trial tactics or circumstances. Gray v. Raines, 662 F.2d 569, 574 (9th Cir. 1981) (Tang, J., concurring). A defendant may not be convicted based on a charge or legal theory "that was neither subject to adversarial testing, nor defined in advance of the proceeding." Sheppard, 909 F.2d at 1237. Sheppard was a "narrow ruling" in which the state conceded that the prosecution "ambushed" the defendant with a new legal theory of which he had no notice before or during trial. Morrison, 981 F.3d at 428.

Even so, the Ninth Circuit has held that the late introduction at trial of a new legal theory or charge may be so fundamentally unfair as to merit habeas relief. In a recent decision affirming the grant of habeas relief, the court explained that a prosecutor cannot "induce[ ] and fail[ ] to correct a belief in the sufficiency of a particular defense strategy" by presenting a new theory of the case at end of trial. Lee v. Small, 419 Fed. Appx. 763, 765, 2011 WL 797332 (9th Cir. 2011). A reviewing court must determine whether it was "reasonable to conceive that [the defendant,] in investigating and preparing his defense, would have proceeded as he did if he had been charged with, or had known that he would be required to meet, a theory of prosecution not stated" in the information or advanced at trial. Id. (quoting Gray, 662 F.2d at 574).

Moreover, if the prosecution's evidence provides a "flimsy basis" for informing defendant of a change in legal theory, then the trial judge's closing jury instruction "cannot itself serve as the requisite notice of the charged conduct, coming as it does after the defendant has settled on a defense strategy and put on his evidence." Gautt, 489 F.3d at 1010-11. In Gautt, the charging document alleged a sentencing enhancement that required proof that the defendant personally used a firearm in the commission of an offense. However, the jury was instructed regarding an enhancement in the same statute that carried a more serious sentence for intentionally firing a firearm and causing great bodily injury in the crime. The prosecutor confusingly "disavowed" the need to prove the intentional aspect of the shooting and conflated aspects of the different enhancements in closing argument, and the jury returned a finding as to the more serious enhancement. Id. at 999-1000.

The Ninth Circuit concluded that Petitioner did not have notice of the chargeagainst him at trial. Given the government's presentation at trial and the lack of discussion of the more serious enhancement

until after the close of evidence, the court found "troublesome" the argument that:

> jury instructions or closing arguments – sure signs that the end of a trial is drawing near – could substitute for sufficient notice to a defendant of the charges that have been leveled against him. While an instruction may be informative in indicating the common understanding of the parties and the court as to what was at stake in the trial, it cannot itself serve as the requisite notice of the charged conduct, coming as it does after the defendant has settled on a defense strategy and put on his evidence.The same limitations are generally true of closing arguments as well. After all, if the purpose behind a defendant's constitutional right to notice is "to enable him to prepare his defense," [James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994)], a rule that allows the state to satisfy this due process consideration via [ ] late-stage trial events can hardly advance that objective.

Gautt, 489 F.3d at 1010 (emphasis in original). The Gautt decision based this on the principle that the Constitution "speaks not of form, but of substance" in providing a defendant with notice of the criminal charge. Id. at 1009 (citing Sheppard and Gray).

A violation of the constitutional right to notice of the nature of a criminal charge is subject to harmless error analysis on habeas review. Id. at 1015-16 (declining to conclude that due process violation was structural error requiring automatic reversal); Lee, 419 Fed. Appx. at 766. Harmless error review requires a federal court to examine whether it believes that the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Reversal is required where "the record is so evenly balanced that a 'conscientious judge is in grave doubt

as to the harmlessness of an error.'" Gautt, 489 F.3d at 1016 (quoting O'Neal v. McAninch, 513 U.S. 432, 438 (1995)).

2. Analysis

a. Adequacy of Notice of Alternative Theory of Liability

Beginning with first principles, the Court agrees that Petitioner was adequately informed about the murder charge and the possibility of an aiding-andabetting argument before the trial began. The two-page information clearly charged Petitioner with the first degree murder of his wife, unmistakeably charging that, "in violation of Section 187(a) of the Penal Code (MURDER), a FELONY, MARVIN VERNIS SMITH did unlawfully and with malice aforethought kill MINNIE SMITH, a human being." (Lodgment # 1, 1CT at 103) (capitalization in original). The information also directly charged an enhancement that the murder was committed for financial gain.

California Penal Code Section 31 states that a person who aids and abets the commission of a crime may be punished as a principal for the crime. Such vicarious liability is implicit in the charging document and need not be pled with specificity before trial under state law. People v. Diaz, 3 Cal. 4th 495, 557 (1992); see also Carothers v. Rhay, 594 F.2d 225, 229 (9th Cir. 1979) (pleading that charges defendant as principal gives "adequate notice" of aiding-and-abetting charge). As a result, the Court concludes that Petitioner had adequate notice before the commencement of trial that he was charged with first degree murder – and that the prosecution could properly have pursued an aiding-and-abetting theory of liability against Petitioner for that murder at trial. See Givens, 786 F.2d at 1380.

Additionally, during pretrial proceedings, the defense was informed of evidence that potentially

could have supported such vicarious liability. The prosecution presented evidence that a jailhouse informant was prepared to testify against Petitioner. That testimony – Petitioner's alleged confession implicating himself in his wife's death – could plausibly have signified that the prosecution intended to prove that Petitioner aided and abetted another individual in killing Petitioner's wife. In the Second Appellate Decision, the court expressly concluded that the informant's anticipated statement "meaningfully apprised [Petitioner] of the potential for an aiding and abetting theory." (Lodgment # 10 at 13.) The Court accepts that the preliminary hearing testimony provided further notice to Petitioner that he might face an aiding-and-abetting liability argument at trial.[FN4] See Morrison, 981 F.2d at 428.

[FN4] Based on its independent review of the preliminary hearing transcript and the trial record, the Court has considerable doubt that the informant's testimony would have materially advanced the aiding-and-abetting hypothesis that the prosecution argued on appeal. The informant certainly would have presented sensational evidence that Petitioner admitted that he wanted to kill his wife for financial reasons. The jailhouse confession also would have advanced the prosecution's proof that Petitioner staged the phony burglary to mislead the police. Yet, the informant's brief statement as summarized in the detective's preliminary hearing testimony did not link Petitioner to another individual involved in the crime, nor did it necessarily even imply the existence of a second participant.

However, the state court's interpretation about the significance of the putative testimony is entitled to deference on habeas review. This federal court accepts the premise that the informant stood to be the prosecution's key – and sole – witness to

establish that Petitioner aided and abetted another in the killing of his wife.

The state appellate court therefore made two important factual findings regarding the trial in its decisions to which this Court defers. First, according to the Second Appellate Decision, the only evidence that the prosecution identified and could potentially have presented at trial regarding aiding-and-abetting liability was the anticipated testimony of the informant. (Lodgment # 10 at 13.) The Second Appellate Decision points to no other facts, testimony, or other proof supporting this legal theory. The Second Appellate Decision essentially labeled the informant's statement as the proxy through which the prosecution could have sought to establish Petitioner's culpability as an aider and abettor.

Second, the appellate court concluded that the prosecution actually presented no evidence at trial to support the aiding-and-abetting hypothesis. The Court of Appeal emphasized this lack of proof in several portions of its First Appellate Decision (Lodgment # 6 at 8, 9, 10), and did not back away from this conclusion in its second decision. Indeed, the reason that the Second Appellate Decision analyzed whether the trial court erred in giving the aiding-and-abetting instruction was because that theory was entirely unsupported by the evidence.

On habeas review under AEDPA, this Court defers to both state court factual conclusions: (1) the charging document and the informant's potential testimony as explained at the preliminary hearing served to give Petitioner notice of the aidingand-abetting theory before trial began; and (2) the prosecution presented no actual evidence (whether from the informant or any other source) to establish that Petitioner helped another person commit the homicide. A state court's factual findings are "presumed correct" on habeas review unless a prisoner is able to convincingly rebut them. Rice v. Collins, 546 U.S. 333, 339 (2006). Here, Petitioner

accepts both findings from the state appellate decisions without challenge.

b. Significance of Pretrial Ruling

The issue for this Court is whether Petitioner had adequate notice that he could be prosecuted for aiding and abetting the murder of his wife after his trial began. Although the defense had notice before trial began – from the contents of the charging document and the evidence at the preliminary hearing – the trial judge's order on the first day of trial abrogated that notice. Moreover, the way in which the trial was conducted and the lack of any evidence supporting the aiding- and-abetting hypothesis further confirmed that Petitioner was accused of actually killing his wife by himself. However, the appellate court analysis of Petitioner's due process claim unreasonably ignored the trial judge's order and the significant impact it had on the case. The Second Appellate Decision failed to acknowledge that the prosecution's theory of liability against Petitioner narrowed considerably after the preliminary hearing and the commencement of trial. In reality, Petitioner had no notice until the very end of the trial that the state intended to pursue an alternative theory of culpability against him.

It is apparent from the transcript that the trial judge affirmatively barred the prosecution from pursuing a key aspect of its case. On the day of opening statements, the court learned that the informant refused to testify against Petitioner at trial. The trial judge clearly recognized the significance of this unexpected twist. He temporarily excused the jury, conducted a remarkable evidentiary hearing at which the court heard sworn testimony from two public defenders, and delayed the parties' opening statements (including the prosecution's then-ongoing opening) for nearly two weeks.

Moreover, in a material, game-changing decision, the trial judge directly ordered both parties

to avoid referring to the informant at all. The trial judge certainly understood the strategic importance of the informant's refusal to testify, noting that the informant may have been a "big basket" into which the parties may have put their proverbial trial "eggs." (Lodgment # 2, 2RT at 424.) The trial judge therefore appropriately precluded the parties from addressing the issue with the jury at the beginning of trial.

The import of that ruling was that the prosecution's aiding-and-abetting theory – which, according to the Second Appellate Decision, was supported only by the informant's potential testimony – was firmly taken off the table. The parties and the court knew from the beginning of the case that the only evidence that could establish such liability was not likely to be presented at trial. Moreover, as the trial developed, the prosecution made clear that it did not intend to call the informant as a witness. As the appellate court correctly concluded, the jury never heard any testimony identifying or suggesting any participant in the crime other than Petitioner.

When the trial judge ruled on the informant issue, it was "reasonable to conceive" that Petitioner would defend the case on the only theory advanced by the prosecution and of which he had notice: whether Petitioner was the assailant who killed the victim. See Lee, 419 Fed. Appx. at 765. The prosecution confirmed that "common understanding" throughout the trial. See Gautt, 489 F.3d at 1010. The prosecutor directly accused Petitioner of striking the killing blow, vigorously disputed the medical evidence that the defense put forward to show that Petitioner was physically incapable of committing the attack, and attempted to dissect Petitioner's alibi for the day of the crime. Additionally, the prosecutor told the trial court toward the end of the government's case that the informant would not testify. The prosecution's actions during the trial assured Petitioner that he was accused of committing the murder directly, and not because he assisted anyone else. As a result, the

evidence that Petitioner presented in his defense and in questioning government witnesses only went toward refuting that allegation. See Murtishaw, 255 F.3d at 954 (analyzing defendant's "actions at trial" to evaluate whether he had notice of theory of government's case).

Petitioner was indisputably "taken by surprise" when the prosecution asked for an aiding-and-abetting instruction after the close of evidence. See Gray, 662 F.2d at 574. Such an instruction added new factual elements for the jury to find, [FN5] which in turn should have required that defendant had the opportunity to offer evidence in response. Here, however, the prosecution was allowed to pursue a new theory of the case – which was unsupported by any evidence – without giving Petitioner the substantive chance to present any witnesses or other proof in his defense. See Givens, 786 F.3d at 1381 (defendant entitled to "notice adequate to enable [him] to prepare a defense against the charge").

> [FN5] According to CALCRIM 401 as given to the jury at trial, the elements of aiding-and-abetting liability are: "1. The perpetrator committed the crime; 2. The defendant knew that the perpetrator intended to commit the crime; 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." (Lodgment # 1, 4CT at 1155.)

As in Gautt, Petitioner surely "settled on a defense strategy" based on the court's pretrial ruling and the prosecution's evidentiary presentation. Gautt, 489 F.3d at 1010. The Ninth Circuit counsels courts to look at the substance (and not the form) of whatever notice the defendant received regarding the criminal charge. Id. at 1009. In the present case, the substance of the court ruling and the trial evidence

gave defendant notice that aiding-and-abetting liability was not going to be a part of the case as long as the informant refused to cooperate. As a result, Petitioner's attorney had no reason to cross-examine government witnesses about whether Petitioner encouraged or hired them to commit the murder, or to put on evidence that someone else killed the victim without Petitioner's involvement in the crime. Indeed, Petitioner's experienced trial lawyer would have been entitled to ask the prosecutor to identify who, in fact, Petitioner was accused of helping to commit the crime – yet she had no cause to do so until after the close of evidence. Whether Petitioner was "induced" into believing that aiding-and-abetting was out of the case based on the judge's order, the prosecution's case-in-chief, or both, the record supports his contention that he lacked notice of that theory during trial. See Lee, 419 Fed. Appx. at 765.

The Court concludes that it was eminently reasonable for the defense to believe that aiding-and-abetting liability would not be at issue in the case. Moreover, fair-minded jurists (including the state court of appeal when it issued the First Appellate Decision) would agree that a defendant is harmed when a court affirmatively precludes a theory of prosecution on the first day of trial, yet allows the prosecution to pursue that theory in rebuttal closing argument. See Richter, 131 S. Ct. at 786.

The Court recognizes the uniqueness of the circumstances in this case. Neither the parties' briefs nor the Court's own research identified a published decision in which a criminal defendant received notice of a theory of prosecution, had that notice withdrawn by operation of a court order, and then faced conviction on the theory after the close of evidence. And, while Gautt, Lee, and other cases overlap considerably with the events at Petitioner's trial, the Court acknowledges that the events in those cases are not identical to the case at bar.

What convinces the Court of the seriousness of the error here is that the state courts should have applied the basic due process principles – notice and the opportunity to present evidence in response to a criminal charge – enunciated in those federal decisions. AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced." Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (quotation omitted). Clearly established federal law entitled Petitioner to notice of the charge against him and how the government intended to prosecute him. Whether he was denied this notice by the actions of an overreaching prosecutor or through reliance on a judge's order, the chain of events at Petitioner's trial failed to satisfy basic notions of due process at a criminal trial.

c. Factual Omission from Appellate Court Decision

The Court further concludes that the Second Appellate Decision was based on an unreasonable determination of the facts below. According to that decision, the prosecution (a) gave sufficient notice to the defense that it intended to pursue its aiding-and-abetting theory through the preliminary hearing statement attributed to the informant, but then (b) failed to present sufficient evidence to support the theory. Under that abbreviated recitation of the events, the Court of Appeal unfairly discounted Petitioner's contention that he did not expect to defend against the prosecution's aiding-and-abetting claim.

The Second Appellate Decision completely and unreasonably ignored the trial judge's ruling on the first day of trial. The notice that Petitioner received regarding the potential for aiding-and-abetting liability was clearly vitiated by the trial judge's decision. When the judge determined that the informant was not likely to testify, he ordered both

parties not to mention the informant – or, by extension, the aiding-and-abetting theory. Petitioner certainly abided by the court's ruling, and so did the prosecution for virtually all of the case. Nevertheless, the judge allowed the government to argue the barred, unsupported theory in closing argument.

The Court finds that the state appellate court unreasonably determined the facts of the case by failing to analyze the trial judge's pretrial preclusion order. The last minute aiding-and-abetting jury instruction represented a reversal of the trial judge's order from the first day of trial. The Second Appellate Decision did not consider or even mention that extraordinary event, though. That unfairly skewed the court's analysis of the defense claim to lack of notice. The Court further finds that the appellate court's failure to properly consider the impact of that order was material to Petitioner's due process claim.

Habeas relief is available where "the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." Taylor, 366 F.3d at 1001. See also Blumberg v. Garcia, 687 F. Supp. 2d 1074, 1113 (C.D. Cal. 2010) (state court unreasonably ignored facts when evaluating whether prosecution used perjured testimony at trial); Saracoglu v. Walker, CV 09-2195 VAP (DMB), 2010 WL 1221764, at *11 (C.D. Cal. Jan. 27, 2010) (error to ignore testimony regarding whether out-of-court statement was testimonial hearsay); Roman v. Hedgpeth, ED CV 04-1226 JFW (FMO), 2008 WL 4553137, at *4 (C.D. Cal. Jun. 30, 2008) (appellate court ignored nature of defense and evidence as to jury misconduct claim). In the present case, the state appellate court plainly misstated the events at trial in a material way. That constitutes constitutional error underAEPDA.

d. Error Was Not Harmless

The Court further finds that the state appellate court's error was not harmless under Gautt or Brecht. Because the prosecution's new theory of liability was raised after the close of evidence, Petitioner could not offer evidence during the trial to refute the contention that he acted with another person to commit the crime. As mentioned above, Petitioner that he might have presented evidence of the lack of a criminal agreement between him and anyone else whom the prosecution alleged helped Petitioner kill his wife. (Docket # 14 at 24.) Petitioner was prevented from doing so, though, by the late assertion of the aiding-and-abetting theory. See Gautt, 489 F.3d at 1010.

More importantly, the Court agrees with Petitioner's contention – and the appellate court's first conclusion – that the proof of Petitioner's guilt was too close to have overriding confidence in the verdict. This was a closely-fought trial with dueling experts, conflicting percipient witnesses, and fierce disagreement over the basic facts of the case. Notably, there was no "home run" evidence – a confession, an eyewitness, a piece of indisputable forensic evidence – that conclusively linked Petitioner to the crime. Rather, the prosecution relied on the cumulative circumstantial evidence and the overall plausibility of its theory of the case, while the defense emphasized Petitioner's alibi for the time of the crime and his physical inability to strike the killing blow.

The prosecutor himself commented on the thinness of the evidence during closing argument. The prosecutor encouraged the jury to convict Petitioner either of committing the crime directly or by aiding and abetting another – "half of you can think it was one way and the other half think it's the other way, doesn't matter[.] I could care less which one you believe." (Lodgment # 2, 16 RT at 3112.) The prosecutor apparently conceded that the evidence of

guilt was not overwhelming under either theory. Additionally, the Court concurs with the appellate court's first decision in which it concluded that the trial judge gave an incorrect version of the aiding-and-abetting liability instruction. Far from helping the jury analyze the evidence of Petitioner's guilt, the trial judge's instruction may well have confused the jury regarding how it was to consider the case.

Given the close nature of the evidence, the Court has real doubts about the validity of the jury's verdict here. Petitioner may well have killed his wife. He may also have hired someone to help him commit the murder. If the prosecution possessed admissible evidence supporting both theories, the law would have allowed the government to pursue both at trial. However, as the trial developed, the prosecution had no evidence to support the aiding-and-abetting theory, and the trial judge ordered both sides to avoid the area entirely. The trial judge unexpectedly allowed the prosecutor to argue a new theory for the first time at the end of a close trial. The Court finds that this violated due process, and that the state appellate court's analysis ignored material facts regarding the trial. For these reasons, the Court recommends that habeas relief be granted.

C. Additional Jury Instruction Claim

The federal habeas petition asserts a single claim of constitutional error – the late decision to instruct the jury regarding the aiding-and-abetting theory. (Docket # 1 at ¶ 7.) However, in his supporting memorandum, Petitioner offers an additional argument against his conviction by challenging the text of the aidingand-abetting instruction.

Assuming that Petitioner pled a separate habeas claim regarding the substance of the jury instruction, the Court concludes that Petitioner is not entitled to relief on that contention. A jury instruction that relieves the prosecution of its burden

of proving every element of a charged offense violates a defendant's due process rights. Carella v. California, 491 U.S. 263, 265 (1989). However, to merit relief when an allegedly erroneous jury instruction is given, petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991); Dunckhurst v. Deeds,[1] 859 F.2d 110, 114 (9th Cir. 1988). To the extent that a habeas petitioner complains that an instruction is not an accurate statement of state law, the state court's decision on direct appeal constitutes a binding interpretation of that state law. Bradshaw v. Richey, 546 U.S. 74, 76 (2005); Souch v. Schaivo, 289 F.3d 616, 621 (9th Cir. 2002). Where a jury instruction error allegedly occurred, the claim is reviewed under the Brecht harmless error standard.

Petitioner argues that the trial judge "mangled" the aiding-and-abetting instruction by including bracketed, optional text from a form instruction that was not relevant to the facts of the case. The Court agrees (as set forth above) that there was a fundamental error in instructing the jury about the concept of aiding- and-abetting culpability at the end of the trial. However, Petitioner sees additional nuances of error in the specific instruction that are far from apparent. When read in the context of the entire set of jury instructions, the Court finds that the extra text read to the jury in the challenged instruction did not itself infect the trial in a manner that violated due process. In its analysis, the state appellate court reasonably reviewed the instruction under state law and properly conducted a harmless error analysis. Habeas relief is not warranted on Petitioner's alternate claim.

IV. RECOMMENDATION

When the prosecution first requested an aiding-and-abetting instruction, it was after the close of evidence at a trial in which proof of a second

criminal participant was absent and had specifically been barred by the trial judge. The trial court should not have given the instruction as a matter of fact (lack of evidence) and as a matter of law (its pretrial ruling). The state appellate court failed to adequately consider this in analyzing whether there was a due process violation. In the context of a close case with conflicting, circumstantial evidence, the constitutional error cannot be considered harmless.

IT IS RECOMMENDED that the District Court issue an Order:

(1) accepting the findings in this Report; and (2) directing that judgment be entered granting the petition and that an order be issued directing Respondent to release petitioner unless the State of California elects to retry Petitioner for murder within 90 days from the filing of the order.

DATED: February 28, 2012

MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE